

# SS-8 Determination—Determination for Public Inspection

Occupation 09DVC.94 Truck Driver	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

## Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from 2011 to 2012 as a CDL driver. The work done by the worker included picking up and delivering various oilfield products. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response stated its business is oilfield tool hauling. The worker was engaged as a driver. He drove the truck to deliver products. The worker used his own tools and equipment to travel to and from the truck site.

The firm stated it provided the worker specific training and instruction related to general safety guidelines. Work assignments were provided via phone call or text message. Dispatch and the trucking manager determined the methods by which assignments were performed. The trucking manager was contacted if problems or complaints arose and was responsible for problem resolution. The firm required the worker to provide verbal or text message reports. The worker's routine was 24-hour on-call, as needed. Services were performed at customer locations. Meetings were not required. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the truck and securing equipment. The worker provided safety equipment such as a hard hat, glasses, and boots. The worker did not lease equipment, space, or a facility. The worker incurred the expense of fuel to and from the work site. Customers paid the firm. The firm paid the worker an hourly rate of pay and a percentage of the long-haul pricing; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to loss or damage of equipment. The worker did not establish the level of payment for the services provided. The worker stated he did not incur expenses.

The firm stated benefits of personal days and bonuses were made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The firm represented the worker as an independent contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker quit. The worker stated he was also provided the benefit of insurance. He did not advertise.

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## Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the services performed by the worker were integral to the firm's business operation. The firm provided instruction and work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In this case, the worker did not invest capital or assume business risks as the firm provided the truck and securing equipment. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Based on the hourly and percentage of load pay arrangements, the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.